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MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF FORMER UNITED STATES DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS MARIO A. BUSTILLO AND MOISES SANCHEZ-LLAMAS

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STATEMENT OF INTEREST[1]

Amici have served as Senior State Department Officials, Ambassadors, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[2] *Amici* express no opinion on what the ultimate resolution of Petitioners' convictions and sentences should be. Nor do all signatories of this brief necessarily agree with the International Court of Justice's ("ICJ") interpretation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("VCCR"), in *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 128 (Mar. 31) ("*Avena*"). But all *Amici* do agree that this Court should abide by the ICJ's interpretation of Article 36 of the VCCR as a matter of comity and uniform treaty interpretation, rather than allowing individual state courts within the United States to adopt their own independent interpretations of the meaning of Article 36. All *Amici* further agree that this Court's failure to respect the ICJ's judgment in

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no party, person or entity other than *Amici* and their counsel authored this Brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this Brief. All parties have granted consent to the filing of this *Amicus Curiae* Brief.

[2] *Amici* include former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former Ambassadors Morton Abramowitz, Stephen W. Bosworth, Jeffrey Davidow, Wendy R. Sherman, Nancy Soderberg, and Frank G. Wisner, former Legal Adviser Herbert J. Hansell, and Special Presidential Envoy James C. O'Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. *Amici* appear in their personal capacities, and by doing so, do not intend to convey the views of their affiliated institutions on the questions presented here. The qualifications of *Amici* are listed in the Appendix to this Brief.

Avena with respect to the two cases currently before the Court would significantly impair the credibility and efficacy of American diplomats in the international arena, jeopardize important U.S. foreign policy interests, and diminish American standing in the world community. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 385 (2000) ("[O]pinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by [a] state Act.").

Amici believe that "[g]reat nations, like great men [and women], should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court therefore should enforce *Avena*'s holdings that: (1) Article 36 of the VCCR provides foreign nationals with judicially enforceable individual rights; and (2) U.S. state and federal courts must afford those individual rights "full effect," notwithstanding the existence of any state procedural bar. To protect the foreign policy interests of the United States, this Court's judgment should ensure that state court rulings do not undermine our diplomatic relations with close allies or damage critical U.S. interests embodied in other treaty regimes.

SUMMARY OF ARGUMENT

From the founding until today, the ability of U.S. diplomats to carry out important foreign policy objectives has critically depended upon strong enforcement of our treaty obligations by the federal government and federal courts. The Framers' difficult experiences under the Articles of Confederation taught them that the United States cannot credibly conduct its foreign relations unless the several States honor national treaty obligations. Under the Articles of Confederation, state violations of national treaty obligations led important allies and adversaries to refuse both to honor their reciprocal treaty obligations and to enter new commercial treaties with the United States.

In drafting the Constitution, the Framers made sure that the federal government would have the authority to bind the entire nation, including the individual States, to our international obligations. Since its inception, this Court repeatedly has reaffirmed that understanding, regularly holding that treaties duly entered by the national government supersede conflicting state laws and bind the States to our national commitments.

The ICJ has interpreted the VCCR as creating judicially enforceable individual rights to consular access and notification, which must be given "full effect" over any state procedural bar. The President has issued an order confirming that the United States has an obligation to comply with its international commitments and to enforce the ICJ's decision in *Avena*. Notwithstanding this clear interpretation of the scope of Article 36 of the VCCR, the Commonwealth of Virginia and the State of Oregon arrested, tried, convicted, and sentenced Petitioners Mario A. Bustillo and Moises Sanchez-Llamas – Honduran and Mexican nationals, respectively – without ever informing either of his right to seek consular assistance.

Oregon's and Virginia's continuing noncompliance in these cases with the VCCR – as construed by the *Avena* court – offends the Framers' constitutional vision and promotes precisely the sort of diplomatic failures that prompted the modern treaty power. The several States' practice of ignoring the VCCR obligations has strained bilateral and multilateral relations, disrupted important national foreign policy interests, and impaired the ability of diplomats to carry out critical initiatives with foreign governments and international organizations.[3] Moreover, state noncompliance with our treaty obligations has caused allies and adversaries alike to criticize the United

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[3] *Accord Medellin v. Dretke*, 125 S. Ct. 2088, 2096 (2005) ("In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem. . . . [that] may have considerable ramifications . . . .") (O'Connor, J., dissenting) (citations omitted).

States and to question our longstanding leadership in international law and human rights.

This Court's decision will affect not just the ability of the United States to enforce the VCCR, but, more broadly, our nation's capacity to participate effectively in a diverse array of treaty regimes in which our executive and legislative branches of government have chosen compulsory international adjudication as a means to protect our national interests. As American diplomats, *Amici* have helped to pursue and secure numerous treaties that confer jurisdiction upon the ICJ and other international dispute-settlement bodies. As American private commercial interests become increasingly global, reliable mechanisms for international dispute resolution will become increasingly central to our nation's foreign policy. The United States cannot build or benefit from these mechanisms so long as States and localities continue to flout international tribunal rulings, break ratified treaties, and jeopardize our global reputation as a dependable treaty partner.

ARGUMENT

I. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Specific Holdings Construing Article 36 of the VCCR.

Article 36 of the VCCR requires all signatory nations, including the United States, to inform "without delay" any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform "without delay" the consular office of that national's detention or arrest. Since 2001, the United States has been a party before the ICJ to three cases interpreting the scope of Article 36 of the VCCR.

First, in *Vienna Convention on Consular Relations* (*Para. v. U.S.*), 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9), the ICJ indicated provisional measures questioning Virginia's violations of a Paraguayan national's

Article 36 rights. Considering that ICJ ruling in *Breard v. Greene*, 523 U.S. 371, 375 (1998), this Court found absent from the ICJ's ruling any "clear and express statement" of the meaning of Article 36 with respect to the issues currently before this Court.

Three years later, however, in *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27) ("*LaGrand*"), the ICJ rejected the U.S. position that rights stemming from violations of the VCCR are solely the "rights of States, and not of individuals." *Id.* ¶ 76. The ICJ specifically held that Article 36 of the VCCR "creates individual rights." *Id.* ¶ 77. Moreover, the ICJ determined that application of procedural default rules in that case violated the VCCR because it prevented "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91 (quoting VCCR art. 36(2), 21 U.S.T. at 101) (alteration in original).

In 2004, in *Avena*, the ICJ held that the United States had violated the consular rights of numerous Mexican nationals in contravention of Article 36(1)(b) of the VCCR by failing to inform fifty-one detained Mexican nationals of their treaty rights and by failing to inform Mexican consular authorities of forty-nine of the detentions. *Id.* ¶ 153(4)-(5).[4] Citing *LaGrand*, the ICJ reaffirmed that Article 36(1)(b) of the VCCR gives detained foreign nationals judicially enforceable individual rights they can "assert[] . . . within the domestic legal system of the United States." *Id.* ¶ 40. The ICJ also held that domestic application of procedural default rules to bar consideration of VCCR claims violated Article 36(2)'s direction that signatories "enable full effect to be given to the purposes

[4] The ICJ held that the proper remedy for these violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals . . . by taking account . . . both of the violation of the rights set forth in Article 36 . . . and of paragraphs 138 to 141 of this Judgment." *Avena* at ¶ 153(9).

for which the rights accorded under this Article are intended." VCCR art. 36(2), 21 U.S.T. at 101; *Avena* at ¶¶ 113-14.

Together, *LaGrand* and *Avena* present clear pronouncements by the ICJ that Article 36 of the VCCR provides individual, judicially enforceable rights that cannot be impeded by local procedural bars.[5] The ICJ's unambiguous interpretation of Article 36 in *LaGrand* and *Avena* binds this Court not just as a matter of international law,[6] but also through principles of comity and uniform treaty interpretation. As this Court has explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). At least as much "mutual trust and respect" should be due the judgment of an international, U.N.-created tribunal that the United States has chosen as the forum for resolution of a certain category of disputes. *See* Sandra Day O'Connor, Federalism of Free Nations, *in International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

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[5] This interpretation of Article 36 is precisely the "clear and express statement" this Court had found lacking in *Breard*. 523 U.S. at 375.

[6] *See Avena* at ¶ 151 (interpretation of Article 36 of the VCCR is one of general application and is not limited to the facts of the case); *see also* 3 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, at 1655-56 (3d ed. 1997) (ICJ judgment "creates a res judicata").

By signing the Optional Protocol to the VCCR, the United States expressly consented to the ICJ's jurisdiction to interpret the meaning of the VCCR. The United States does not deny that the decision in *Avena* was reached by an impartial judicial body[7] or that the United States fully and fairly litigated the dispute. Given this background, rules of comity should require that the ICJ's judgment be given full effect in U.S. courts without reexamining the merits of that decision. *Cf. Hilton*, 159 U.S. at 202; *see id.* at 203 ("[T]he merits of the case should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion . . . that the judgment was erroneous in law or in fact."); *see also Medellin v. Dretke*, 125 S. Ct. 2088, 2094 (2005) (Ginsburg, J., concurring) ("It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a 'let's see if we agree' approach is out of order.").

This Court should adhere to the ICJ's interpretation of Article 36 of the VCCR to help ensure that the VCCR's provisions on consular access are consistently interpreted and uniformly applied by all signatories – one of the parties' principal goals in enacting the VCCR in the first place.[8] When a multilateral treaty results from an effort to achieve uniform treatment of a particular subject, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660

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[7] Indeed, in *Avena*, the ICJ's determination of liability was reached by a vote of 14-1 (with the U.S. judge in the majority), and its determination of remedy was reached by unanimous vote. *Avena* at ¶¶ 153(4)-(7), (9), (11).

[8] *See* Report of the U.S. Delegation to the U.N. Conference on Consular Relations, *reprinted in Vienna Convention on Consular Relations and Optional Protocol*, Sen. Exec. Rep. 91-9, 91st Cong., 1st Sess., at 3 (1969) (report of Sen. Fulbright) (stating that the U.S. entered into the VCCR to "further friendly relations between nations through the orderly development of uniform standards of consular practice").

(2004) (Scalia, J., dissenting).[9] The *Avena* court itself recognized the importance of this principle of uniform treaty interpretation, stating that it had approached the decision "from the viewpoint of the general application of the Vienna Convention" and intended its interpretation and application of the VCCR to apply in any future case between *any* parties to the VCCR. *See Avena* at ¶ 151. Both this principle of uniform treaty interpretation and the VCCR itself would be eviscerated were each national party (or local province thereof) to insist upon applying its own peculiar interpretation of the VCCR.

Recent U.S. Executive Branch positions reinforce *Amici*'s claim that principles of comity and uniform treaty interpretation warrant application of *Avena*'s interpretation of the VCCR. In his February 28, 2005 Presidential

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[9] *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *Air France v. Saks*, 470 U.S. 392, 404 (1985); *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we [as judges] must, absent extraordinarily strong contrary evidence, defer to that interpretation."); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) ("A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible."); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 Am. Soc'y Int'l L. Proc. 305, 305 (2004) ("When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated."); A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer (Jan. 13, 2005) (transcript *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm (last visited Dec. 18, 2005)) ("[T]he object of a treaty being to come up with a text that is the same for all the countries, [the U.S. courts] should defer to the views of other signatories, much as we defer to the views of agencies—that is to say if it's within [the] ball park, if it's a reasonable interpretation, though not necessarily the very best.") (comments of Justice Scalia).

Determination directing state courts to comply with *Avena*, President Bush declared that "the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision *in accordance with general principles of comity*."[10] Subsequently, the Executive Branch has submitted two *amicus* briefs explaining the reasoning behind this Presidential Determination.[11] These briefs make clear that the presidential decision to adhere to *Avena* as a matter of comity was not tied to the fact that the United States was an immediate party to the *Avena* decision.[12] Instead, the United States argues, as *Amici* do here, that state compliance with *Avena* is essential for broader diplomatic reasons: because compliance "protect[s] the interests of United States citizens abroad, promotes the effective conduct of foreign

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[10] Brief for the United States as *Amicus Curiae* Supporting Respondent at app. 2, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (Memorandum from the President to the Attorney General (Feb. 28, 2005)), 2005 WL 504490, at *1aa (emphasis added).

[11] *See* Brief for the United States as *Amicus Curiae* Supporting Respondent, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490; Brief for the United States as *Amicus Curiae*, *Ex Parte Jose Ernesto Medellin*, No. AP-75,207 (Tex. Crim. App. Jun. 22, 2005), *available at* http://www.debevoise.com/publications/pdf/CCA%20US%20Amicus.pdf (last visited Dec. 18, 2005) [hereinafter U.S. CCA Brief].

[12] To the contrary, the United States claims that "[i]n particular circumstances, the President may decide that the United States will not comply with an ICJ decision and, if Security Council enforcement measures are proposed, direct a veto, consistent with the United Nations Charter." U.S. CCA Brief at 21; *see also id.* at n.3 (citing the United States' failure to abide by the ICJ's determination in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 146, (June 27)). The U.S. Government's brief gives little weight to the fact that the United States was a party to the VCCR's Optional Protocol when *Avena* was decided because "[t]he Optional Protocol does not itself commit the United States to comply with a resulting ICJ decision." *Id.* at 17. If so, it is unclear why the U.S. decision to *withdraw* from the Optional Protocol on March 7, 2005 should affect the question whether compliance with *Avena* remains necessary as a matter of comity. *Id.* at 17 n.1.

relations, and underscores the United States' commitment in the international community to the rule of law." U.S. CCA Brief, *supra* note 11, at 13; *see also id.* at 23 (explaining the President's decision to adhere to *Avena* as the product of "delicate and complex calculations . . . taking into account" a number of factors, including "the need for the United States to be able to protect Americans abroad, the international legal obligations of the United States, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests").[13]

Against this background, the refusal of state courts to adhere to *Avena* will undermine America's credibility as a global leader and seriously hinder foreign policy objectives at a critical time in our nation's history. The United States has long declared that the right to consular access guaranteed by the VCCR is "widely accepted as the standard of international practice of civilized nations."[14] Through its diplomats, our government routinely calls on such nations as Iraq, Syria, China, and North Korea to abide by this minimal standard when U.S. citizens are detained abroad.[15]

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[13] Significantly, the U.S. Government brief also asserts that applying the "review and reconsideration" of VCCR claims as set forth in *Avena* will be easy for state courts to accomplish. *See id.* at 29.

[14] Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 385 (1997) (quoting telegram sent from U.S. Department of State to its Embassy in Damascus on February 21, 1975 [hereinafter Damascus Telegram], *as reprinted in* Luke T. Lee, *Consular Law and Practice* 145-46 (2d ed. 1991)).

[15] S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 729 (1995) (noting U.S. protest of delay in notification of detention of U.S. missionaries in El Salvador); Transcript of State Dep't Regular Briefing, Fed. News Serv., Aug. 19, 1999 (James Rubin, State Dep't spokesman, reporting on request for access and immediate grant of access to U.S. citizen detained in China); Associated Press, *Iraqis Refuse Access to Americans for Second Day*, Apr. 19, 1995 (quoting State Department

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The United States not only drafted the amendment that ultimately became Article 36, but also led the effort to convince nations throughout the world to confer compulsory jurisdiction on the ICJ, precisely because American foreign policy officials realized that diplomatic overtures alone were insufficient to enforce the VCCR.[16] Over two decades ago, when Iran famously violated the VCCR by taking U.S. diplomats hostage in Tehran, then flouted its obligation under the Optional Protocol to comply with the ICJ's order to release the hostages, then-President Carter accused Iran of showing "'contempt, not only for international law, but for the entire international structure for

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spokesman: "Obviously, we are extremely disappointed that the Iraqi government has reneged on its promise to allow these weekly visits. We're disappointed because that is their legal obligation under the Vienna Convention."); Transcript of State Dep't Regular Briefing, Fed. News Serv., July 15, 1999 (James Rubin, State Dep't spokesman, commenting on detention of U.S. female citizen: "We remind the government of North Korea of its obligations under the Interim Consular Agreement of 1994 and the Vienna Convention on Consular Relations to permit consular access to detained U.S. citizens."); *see also* Lee, *supra* note 14, at 145-46 (documenting U.S. invocation of the VCCR); Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioner Jose Ernesto Medellin at 17 & n.26, *Ex Parte Jose Ernesto Medellin*, No. AP-75,207 (Tex. Crim. App. Jun. 22, 2005) [hereinafter Diplomats CCA Brief], *available at* http://www.debevoise.com/publications/pdf/BriefAmiciCuriaeofFormerUSDiplomats.pdf (last visited Dec. 18, 2005).

[16] *See* Brief for Ambassador L. Bruce Laingen and Lt. Col. John J. Swift et al. as *Amici Curiae* Supporting Petitioners at 6-16, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928); Brief for International Law Experts as *Amici Curiae* Supporting Petitioners at 11-13, 15-21, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (describing the U.S. role in the creation and implementation of the VCCR); Luke T. Lee, *Vienna Convention on Consular Relations* 111, 113 (1966); *see also* Sen. Exec. Rep. 91-9, at 19 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration of the State Dep't); U.N. Conference on Consular Relations, Mar. 4–Apr. 22, 1963, *Official Records*, 1st Comm., 29th mtg., ¶¶ 36, 54, U.N. Doc A/CONF.25/16 (1963); *id.* at plenary mtg., 21st mtg., ¶¶ 17-20.

securing the peaceful resolution of differences among nations.'"[17]

Today, our closest allies now accuse the United States of showing similar disregard for the VCCR and the ICJ. Through numerous calls, meetings, and letters to both state and federal authorities, our allies have strenuously requested review and reconsideration of the convictions and sentences of their citizens who were denied their VCCR rights despite orders of the ICJ.[18] There are few, if any, areas of our foreign policy in which *Amici* can recall hearing so consistently from foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations.

International and regional human rights bodies have echoed the vigorous protests of foreign governments. The Inter-American Commission on Human Rights, the European Parliament, and the U.N. High Commissioner for Human Rights have each strongly criticized U.S. violations

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[17] Philippe Sands, *An Execution Heard Around the World*, L.A. Times, Apr. 16, 1998, at B9 (quoting President Carter's comments during the Iranian hostage crisis).

[18] *See, e.g.*, Ginger-Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Laura LaFay, *World Court – U.S. To Halt Execution*, Virginian-Pilot, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italiar government to execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. Times, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General); David Schwartz, *Plan To Execute German Killers Attracts Scrutiny*, Dallas Morning News, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog requesting support for clemency from President Clinton and Arizona Governor Hull); *see also* Rodrigo Labardini, *International Court of Justice Finds U.S. Breached Its Obligations Under the Vienna Convention on Consular Relations*, 20 Int'l Enforcement L. Rep. 250, 251 n.8 (June 2004) (documenting six letters sent by the government of Mexico to the United States regarding the execution of Irineo Tristan Montoya by Texas in 1997); Diplomats CCA Brief at 18 & n.29.

of the VCCR.[19] The European Union has lodged numerous official demarches with state authorities requesting reconsideration of pending executions because of violations of the VCCR.[20]

The widespread international opposition to the several States' persistent practice of violating the VCCR and the ICJ decisions construing that treaty has undeniably harmed our global position as a human rights leader.[21]

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[19] *See, e.g.*, *Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69-70 (2002) (describing notification of the right to consular assistance as "among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial" and stating that failure to notify of such rights violated Mexican national's right to due process); *Resolution on Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify foreign nationals of rights to consular access and noting "demonstrably extremely poor quality" of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, Wash. Post, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because of the denial of his rights under the VCCR by the state of Texas); Dana Priest & John M. Goshko, *Genocide Warning Center Established; Clinton Human Rights Initiatives Include Changes at INS*, Wash. Post, Dec. 11, 1998, at A52 (referring to a speech by U.N. High Commissioner for Human Rights before U.N. General Assembly, criticizing the execution of Joseph Stanley Faulder, a Canadian citizen, because of the denial of his rights under the VCCR by the state of Texas); Diplomats CCA Brief at 19-20 & n.32.

[20] Demarches by the European Union have been filed in a number of cases, including: (1) Joseph Stanley Faulder, Canada, Dec. 8, 1998; (2) Miguel Angel Flores, Mexico, Nov. 3, 2000; (3) Hung Thanh Le, Vietnam, Dec. 4, 2003; (4) Gregory Madej, Poland, May 1, 2001; (5) Javier Suarez Medina, Mexico, July 23, 2002; (6) Osvaldo Torres, Mexico, Apr. 30 and May 6, 2004; (7) Gerardo Valdez Maltos, Mexico, June 5 and July 13, 2001.

[21] *See, e.g.*, George Boehmer, *Killer Loses Fight for Life*, Daily Tel. (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German parliament's Human Rights Committee Chairman Roth's reaction to the

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State noncompliance with these rulings has undermined our authority in several important international human rights bodies.[22] International disapproval of our noncompliance with the VCCR has also deflected attention away from serious human rights abuses in other countries. Actions of the several States in violation of the VCCR and the ICJ decisions construing that treaty have provided our adversaries with diplomatic ammunition to challenge the sincerity of our own commitment to human rights and the rule of law in international relations.[23] As the German

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LaGrand execution: "When [Secretary of State Madeleine] Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously."); Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, *at* http://web.amnesty.org/library/Index/engAMR51027 1998 (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: "[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights.") (last visited Dec. 21, 2005); Diplomats CCA Brief at 19-20 & n.34.

[22] Shortly after the LaGrand executions occurred despite a contrary ICJ provisional measures order, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body's 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1. Shortly thereafter, the United States likewise failed to win a seat on the Inter-American Commission on Human Rights for the first time since that body's inception in 1959, and its observer status in the Council of Europe – which bans executions – has been put in jeopardy, in part because of U.S. executions of foreign nationals who had not been counseled under the VCCR. Connie de la Vega, *Going It Alone*, Am. Prospect, July 2004, at A22.

[23] *See, e.g.*, Raymond Bonner, *Mexican Killer Is Refused Clemency by Oklahoma*, N.Y. Times, July 21, 2001, at A8 (quoting Mexican government as declaring Oklahoma's execution of Mexican national denied VCCR rights as "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. Times, Mar. 5, 1999, at 14 (quoting German Justice Minister, declaring that Arizona's execution of the two LaGrand brothers "is barbaric and unworthy of a [nation] based on the

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Justice Minister stated in announcing Germany's suit against the United States in the ICJ to challenge the execution of two German nationals who were denied consular rights: "Respecting international laws cannot be a one-way street."[24] So long as the United States continues to promote the rule of law around the world, other nations will equally demand that we set an example by complying strictly with our own binding obligations under the U.N. Charter, the ICJ statute, and the VCCR.

Taken together, continued state noncompliance with our obligations under the VCCR has significantly hampered the ability of the President, *Amici*, and other diplomats to carry out foreign policy initiatives. In *Amici*'s experience, a significant proportion of important bilateral and multilateral meetings with our closest allies is now consumed with answering diplomatic demarches challenging these practices, rather than addressing issues more central to our core national foreign policy interests.

Allowing state courts to keep ignoring the ICJ's interpretation of Article 36 in *Avena* and *LaGrand* would inevitably harm our diplomatic relations with our closest allies. Foreign hostility stirred by the U.S. practice of executing foreign nationals who were denied their VCCR rights has triggered fierce press criticism and even angry demonstrations in front of U.S. embassies abroad.[25] Such

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rule of law"); David Stout, *Do As We Say, Not As We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. Times, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the VCCR: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts.").

[24] *See Germany Sues U.S. for Breaking Law*, Reuters, Sept. 16, 1999, *available at* http://www.ub.es/penal/historia/PdeM/dpicintl.html (last visited Dec. 19, 2005).

[25] *See* Brian Knowlton, *Execution Pits Mexico Against U.S.; Fox Echoes World on Death Penalty*, Int'l Herald Trib., Aug. 16, 2002, at 1 (documenting intense media attention in Mexico); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set To Die Today for 1975*

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protests have seriously disrupted important diplomatic missions, and at times, even threatened the physical safety of U.S. diplomats and embassy staff trying to work in these countries.[26]

Killing, Boston Globe, Dec. 10, 1998, at A2 (describing the execution of Stanley Faulder as a "cause celebre . . . dominating front pages and television newscasts" in Canada); Stout, *supra* note 23 (citing protest in front of U.S. embassy in Paraguay); *Paraguay Angered by US Execution*, BBC News, Apr. 15, 1998, *available at* http://news.bbc.co.uk/1/hi/world/americas/78602.stm (last visited Dec. 21, 2005) (documenting public outcry and inundation of radio channels in Paraguay with angry calls); Adam E. Jacobs & Mark A. Berman, *Rediscovering the Right to Consul*, N.J. L.J., Mar. 2, 1998, at 32 (describing demonstration in front of U.S. Consulate in Ecuador); *Texas Executes a Mexican Killer, Raising a Furor Across the Border*, N.Y. Times, Mar. 26, 1993, at A15 (describing protests). After Arizona executed Jose Roberto Villafuerte, a Honduran national, 500 Hondurans protested at the U.S. Embassy in Tegucigalpa, and Honduran newspapers reported retaliatory threats against the lives of U.S. citizens in Honduran prisons. *Nicaragua Solidarity Network of Greater New York, Hondurans Protest Execution in U.S.*, Weekly News Update on the Americas, Apr. 26, 1998, *available at* http://www.tulane.edu/~libweb/RESTRICTED/WEEKLY/1998_0426.txt (last visited Dec. 21, 2005). In 1999, to protest the execution of a Canadian who had been denied his rights under the VCCR, local activists planned demonstrations and other organized protests, including letter-writing campaigns and threatened economic boycotts. *U.N. Official Frets over Canadian's Texas Execution; Ottawa Steps Up Bid To Spare Albertan Convicted of Murder*, Toronto Star, Nov. 26, 1998, at A9; *Texas Embroiled in International Legal Rights Dispute Over Preparations To Execute a Canadian Citizen* (NPR Morning Edition broadcast, Dec. 9, 1998); Diplomats CCA Brief at 22 & n.31.

[26] During public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4000 U.S. personnel, including diplomatic staff, had to be protected by armed security. *See U.S. Boosts Security in Honduras As Tempers Flare*, Reuters, Apr. 24, 1998; Stout, *supra* note 23. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the VCCR, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, Hous. Chron., Sept. 28, 1997, at A1.

As U.S. diplomats, *Amici* have sought fully to discharge U.S. responsibilities under the VCCR to encourage the fullest reciprocal protection for American citizens who are detained while living or traveling abroad.[27] For the same reason, for more than half a century, the United States has vigorously protected its right of consular access to American citizens held abroad through the ICJ.[28] To protect our own nationals, the United States expects to gain consular access within seventy-two hours for any and all U.S. citizens and diplomats who are taken into foreign custody. U.S. Department of State, Consular Notification and Access, Part 3: FAQs, *available at* http://travel.state.gov/law/consular/consular_748.html (last visited Dec. 19, 2005). It would be all too easy for foreign governments to ignore those requests if U.S. courts could simply refuse to respect the VCCR at home, in the face of a directly applicable treaty interpretation rendered by the ICJ.

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[27] In a 1975 telegram to the Syrian Embassy, the State Department confirmed that the United States's willingness to provide consular access to foreign nationals rests in good measure upon expectations of reciprocity from our treaty partners. *See* Damascus Telegram, *as reprinted in* Lee, *supra* note 14 ("The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.").

[28] As early as 1954, the United States sought to bring suit in the ICJ against Hungary, challenging Hungary's failure to provide consular access before trial to four U.S. airmen whose plane had been shot down. *See Treatment in Hungary of Aircraft and Crew of the United States of America* (*U.S. v. Hung.*), 1954 ICJ Pleadings 19-20, 31, 35-36. The suit was eventually dismissed for lack of jurisdiction over Hungary, which had not yet signed the Optional Protocol. 1954 ICJ 99 (July 12); *see also Case Concerning United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*), 1980 I.C.J. 3 (May 24).

II. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Rulings That Article 36 of the VCCR Creates Judicially Enforceable Individual Rights That Must Be Given Full Effect Despite Local Procedural Bars.

A. The ICJ's Ruling Regarding Enforceable Rights Benefits U.S. Diplomatic Interests by Promoting Stricter Enforcement of the VCCR.

The ICJ has repeatedly and explicitly held that the VCCR creates a judicially enforceable individual right.[29] In so holding, the ICJ specifically rejected claims by the United States that the rights in question are somehow rights of States and not individuals. In *LaGrand*, for example, the ICJ carefully read the text, history, negotiations, and practical construction adopted by the parties to the VCCR to conclude "that [VCCR] Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[30]

Notwithstanding that declaration, the Oregon Supreme Court invoked a broad "presumption *against* the creation of individual, judicially enforceable rights" by means of treaties. *State v. Sanchez-Llamas*, 108 P.3d 573, 576 (Or. 2005). In fact, the VCCR gives rise to no such presumption. This Court has long recognized that self-executing treaties

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[29] *See supra* Part I; *see generally* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 596 (1997) (concluding from an examination of the travaux preparatoires of the VCCR that the general intent of the drafting parties in Article 36 was to create individual rights).

[30] *LaGrand*, at ¶ 77; *see also id.* ¶¶ 38, 42, 74, 78, 126; *Avena*, at ¶¶ 35, 40, 124, 139-40 (rejecting U.S. position that Article 36 rights are not individual rights).

may create judicially enforceable individual rights.[31] During the Senate hearings on the VCCR, the State Department advised the Senate that the "Convention is considered entirely self-executive and does not require any implementing or complementing legislation."[32] The ICJ rulings in *LaGrand* and *Avena* therefore define self-executing treaty obligations of the United States, which are the supreme law of the land under Article VI of the U.S. Constitution, and hence binding rules of decision to be applied by all state courts acting upon legal claims of the kind at issue here.[33]

Requiring the several States to recognize Petitioners' individual rights would plainly advance U.S. diplomatic interests. Ever-increasing numbers of Americans work and travel abroad each year, in an expanding array of foreign countries. As of 2004, over 160 countries were signatories to the VCCR.[34] State-to-state enforcement of the VCCR through the already overburdened diplomatic process necessarily provides only partial protection to American

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[31] *Cf. United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (if a treaty "is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation"); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 727, 734-35 (2004) (distinguishing rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty such as the VCCR).

[32] Sen. Exec. Rep. 91-9, at 5 (statement of J. Edward Lyerly, Deputy Legal Advisor for Administration of the State Dep't); *see also* Restatement (Third) of the Foreign Relations Law of the United States, Intro. Note preceding § 464 (3d ed. 1987).

[33] When ratification of the VCCR was pending, the Senate asked: "What is the effect of the convention on (a) Federal legislation; and (b) State laws?" The State Department answered, in relevant part: "To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions." Sen. Exec. Rep. No. 91-9, at 18.

[34] *See* Status of Multilateral Treaties Maintained by the U.N. Secretary General, *available at* http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIII/treatyb.asp (last visited Dec. 18, 2005).

citizens traveling abroad. The ICJ's construction of Article 36 of the VCCR to require judicially enforceable individual rights preserves diplomatic relations by enabling detained Americans to use private enforcement in lieu of, or as a supplement to, this overextended diplomatic process.

The high priority that the President has placed on defeating international terrorism and protecting national security requires governments and their respective intelligence agencies to cooperate closely through diplomatic channels. Yet when the several States refuse to respect our consular obligations, it is only a matter of time before those diplomatic relations become strained. Americans detained abroad are far less likely to receive their consular rights when the country detaining them can charge the United States with having failed to comply with its own diplomatic obligations.[35] For a state court to refuse to acknowledge that the VCCR provides a judicially enforceable individual right undermines the effective enforcement of the VCCR, and places even more pressure on overworked American diplomats.

It is for these reasons, among others, that other national courts – in Germany and Canada, for example – have accepted as binding the ICJ's interpretation that the VCCR creates judicially enforceable individual rights. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov.

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[35] For example, in 1995, an American citizen, Harry Wu, was arrested in China, charged with espionage, and held incommunicado for over a week. U.S. State Department attempts to gain access to Mr. Wu were rebuffed by China on the pretext that, on at least two prior occasions, U.S. authorities had failed to comply with a minor provision of the U.S.-China Consular Convention far less important than VCCR Article 36 (the requirement that each party report the death of any foreign national to the deceased's consulate). *U.S. Says China Misled It on Scholar's Whereabouts; Envoy Says He Took 12-Hour Taxi Ride in Remote Region Based on Misinformation*, S.F. Examiner, July 4, 1995, at A12 (noting the Wu situation had harmed U.S.-China relations); Transcript of U.S. State Dep't Press Briefing, July 6, 1995, 1995 WL 407848, at *12-14 (F.D.C.H.) (State Dep't Spokesman Nicholas Burns).

7, 2001, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 116 (F.R.G.); *Regina v. Partak*, [2001] 160 C.C.C.3d 553, ¶¶ 25-26 (Ont. Super. Ct.) (Canada), *available at* 2001 CarswellOnt 4954 (Westlaw). Moreover, in its first encounter with this question, this Court acknowledged that the VCCR "arguably confers on an individual the right to consular assistance following arrest." *Breard*, 523 U.S. at 376. Following *Breard*, the lower courts have generally assumed, for the purposes of the cases before them, that a judicially enforceable individual right exists.[36] In erroneously rejecting the enforceability of Article 36 rights, the Oregon Supreme Court thus acted inconsistently not just with the binding and supreme law of the land, but also with the clear thrust of precedents of this Court and other lower courts.

B. The ICJ's Refusal To Recognize State Procedural Bars Benefits U.S. Diplomatic Interests.

In *Bustillo*, the Virginia court held that a state procedural default rule could be applied to foreclose a VCCR claim. But the VCCR is precisely the kind of treaty that the Framers had in mind when they chose to render treaties supreme over inconsistent state law. Virginia's and Oregon's noncompliance with the ICJ's ruling in *Avena* defies the authority of the federal government to bind the States to international obligations. Left unchecked, the persistent failures of Virginia, Oregon, and other States of the Union to comply with *Avena*'s interpretation of the

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[36] *See, e.g.*, *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) ("In light of the language in Article 36 and the above cited authority, the Court finds that [defendants] have an individual right to consular notification under Article 36 which in turn grants them standing to object to a violation of that provision."); *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001) (collecting cases).

VCCR will inevitably alienate this nation from its closest allies.

The ability of the United States to present a credible diplomatic face to the world turns critically upon the national government's ability to make authoritative commitments to international agreements. For that reason, this Court repeatedly has recognized that "[n]o State can rewrite our foreign policy to conform to its own domestic policies." *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also id.* ("Power over external affairs is not shared by the states; it is vested in the national government exclusively."); *Crosby*, 530 U.S. at 377 ("Quite simply, if the [state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence."). Under the Articles of Confederation, the Continental Congress possessed the treaty power, but could not effectively enforce treaty obligations upon the States.[37] As a result, States were able to undermine agreements negotiated on behalf of the United States as a whole – leading to international skepticism of the fledgling United States as a dependable treaty partner.

In responding to the diplomatic paralysis resulting from the diverging state stances on foreign policy, the Framers specifically included treaties under the Supremacy Clause of the Constitution as part of the "Supreme Law of the Land," U.S. Const. art. VI, cl. 2. By so doing,

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[37] Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." Articles of Confederation and Perpetual Union, art. IX. The Continental Congress, however, had no authority to regulate interstate or foreign commerce. *See id.* art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

the Framers sought to guarantee, in John Jay's words, that "treaties . . . will always be expounded in one sense and executed in the same manner – whereas adjudications on the same points and questions, in [the several] States, . . . will not always accord or be consistent."[38]

In *Avena*, the ICJ noted that nine States had violated Article 36(1) of the VCCR a total of fifty-one times by failing to provide detained Mexican nationals with their consular rights under the treaty. *See Avena* at ¶ 15. These violations have damaged relations between the United States and its closest allies.[39]

The ICJ consistently has ruled that the application of procedural default rules to prevent individuals from raising claims under Article 36(1) of the VCCR violates Article 36(2) of the VCCR, which requires states to give "full effect" to the consular rights enumerated in Article 36(1). This Court's failure to direct the several States to adhere to the ICJ's interpretation of Article 36 would allow those States to undermine the United States' diplomatic credibility and prevent the United States from speaking with one voice.

Allowing individual States to apply procedural bars to block the effective implementation of Article 36 rights

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[38] The Federalist No. 3, at 15 (John Jay) (Robert Scigliano ed., 2000).

[39] Officials of our nearest neighbors have openly declared that the failure of American state authorities to provide their nationals with timely consular access has "strain[ed]" bilateral relations. Raymond Bonner, *U.S. Bid To Execute Mexican Draws Fire*, N.Y. Times, Oct. 26, 2000, at A20 (quoting Jorge G. Castaneda, foreign policy advisor to Mexican President Fox). In 2002, even before the ICJ issued its final judgment in *Avena*, Mexican President Vicente Fox even took the extraordinary step of canceling a trip to President Bush's Texas ranch as " 'an unequivocal signal of rejection of the execution' " of a Mexican national who had not been informed of his consular rights. Knowlton, *supra* note 25, at 1 (quoting President Fox's representative); *see also* Nickerson, *supra* note 25, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen Stanley Faulder who had been denied consular rights).

would undermine the safety of Americans living and traveling abroad. There are currently at least twenty-five nations[40] – presiding over one-third of the world's population[41] – that have federal systems with diverse state laws, courts and procedures. If states and provinces in each of these countries could invoke local procedural bars to excuse noncompliance with the VCCR, as Virginia and Oregon have done here, the protections afforded by that treaty to detained American citizens would quickly become meaningless.

As diplomats, *Amici* have struggled to secure the States' cooperation in implementing VCCR obligations. In 1998, Secretary of State Madeleine Albright, a signatory to this Brief, wrote to the Governor of Virginia with regard to Angel Francisco Breard, a Paraguayan national for whom the ICJ granted a provisional measure directing the United States to stay his execution because Virginia officials had ignored his VCCR rights.[42] In requesting that the Governor exercise his powers to stay Breard's execution, Secretary Albright explained that she was "'particularly concerned about the possible negative consequences

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[40] Argentina, Australia, Austria, Belgium, Bosnia & Herzegovena, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Saint Kitts & Nevis, Serbia & Montenegro, South Africa, Spain, Switzerland, Russia, United Arab Emirates, United States, Venezuela. *See* U.S. Department of State, Country Background Notes, *available at* http://www.state.gov/r/pa/ei/bgn/ (last visited Dec. 19, 2005). Indeed, the recently formed Republic of Iraq may soon become the newest member of the community of federalist nations and is one country in which a large number of Americans are almost certain to be present in the near future.

[41] Objectives, Center for the Study of Federalism, Temple University, *at* http://www.temple.edu/federalism/objectives.html (last visited Dec. 18, 2005).

[42] Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 Am. J. Int'l L. 666, 671-72 (1998).

[of the execution] for the many U.S. citizens who live and travel abroad.'"[43] It is precisely to ensure that foreign provinces cannot claim a right to violate national obligations that the State Department has since taken such great pains to instruct state and local law enforcement officials on the issue of consular notification.

Failure to hold the several States accountable for U.S. obligations under international law would set a dangerous precedent. As the first country designed on federalist principles, the United States historically has served as a model for many other nations. Indeed, many of these nations are seeking to reconcile their international obligations with their federal structures and continue carefully to observe U.S. practices.[44] A government's capacity to ensure the reciprocity critical to international cooperation among nations is only as strong as the compliance that those national governments can obtain from their federated parts.[45] This Court should not allow the several

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[43] *Id.* "'The execution of Mr. Breard in the present circumstances,'" Secretary Albright observed, "'could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention'" and "'could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.'" *Id.*

[44] For example, Brazil recently passed a constitutional amendment that allows the Attorney General to "federalize" state court cases involving human rights violations. The relevant amendment states that this power shall be exercised in order to assure the fulfillment of obligations incurred by the Brazilian government through international human rights treaties. Emenda Constitucional No. 45, de 30 de dezembro de 2004, *available at* https://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm#art109 (last visited Dec. 19, 2005) (author's translation).

[45] In India, for example, the laws of five states on "religious conversion" have so affected the work of Christian missionaries that the State Department's Consular Information Sheet for India specifically warns Americans who wish to engage in missionary activities in these states to seek legal advice regarding the state legislation. *See* U.S.

(Continued on following page)

States to erect parochial legal barriers that would render meaningless our foreign policy objectives and international obligations.

III. Allowing State Courts To Refuse To Enforce the *Avena* Ruling Also Would Damage U.S. Foreign Policy Interests Governed by Other Treaty Regimes.

As U.S. diplomats, *Amici* consistently have sought to ensure the proper functioning of the international treaty regimes to which the United States is a party. *Amici* believe that the state courts' failure to respect the ICJ's determinations in this context will threaten U.S. commercial and economic interests in other treaty regimes.

The ICJ dispute-settlement provisions in the VCCR are not *sui generis*. After World War II, when international trust and diplomacy were at a low ebb, the United States took the initiative to establish numerous treaties with its former enemies that resolved disputes through binding decisions of the ICJ.[46]

In return for our commitment to abide by ICJ judgments, the United States gained not only the cooperation of other states, but also a powerful diplomatic tool for encouraging non-judicial resolution of disputes.[47] Even

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Department of State, Consular Information Sheet: India, Aug. 24, 2005, *available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_1139.html (last visited Dec. 19, 2005).

[46] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. XXVII, 7 U.S.T. 1839, 1867; Treaty of Peace with Japan, Sept. 8, 1951, art. 22, 3 U.S.T. 3169, 3188-89.

[47] Indeed, "[m]any cases are settled before a final judgment is reached," giving the ICJ "an important 'pacifying effect' on disputes at all stages of litigation." Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434, 436 (2004).

nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ.[48]

The "mutuality and reciprocity" that forms the foundation of international relations is particularly critical for the effective operation of our nation's commercial and economic treaties. *See generally United States v. Arjona*, 120 U.S. 479, 487 (1887) ("[I]nternational law obligations are of necessity reciprocal in nature."). The continuing ability of the United States to secure international treaty regimes vital to the realization of our national interests throughout the world, and to secure reliable enforcement of those regimes already in place, depends directly upon our reputation for honoring the international obligations that we undertake.

The last half of the twentieth century has witnessed the direct application of international trade agreements to a multitude of commercial relationships between individuals and nations. A vast array of agreements dealing with international trade and foreign investment now call for binding arbitration or resort to permanent international tribunals to resolve intractable disputes. Moreover, many important economic treaties vest compulsory jurisdiction in the ICJ, including international sovereign disputes

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[48] *See, e.g.*, *Trial of Pakistani Prisoners of War* (*Pak. v. India*), 1973 I.C.J. 328 (July 13), and 1973 I.C.J. 347 (Dec. 15) (dispute settled out of court). For example, when the United States inadvertently downed an Iranian civilian airliner, killing 290 passengers and crew, despite our strained diplomatic relations, Iran sought a peaceful solution by bringing suit before the ICJ, and the parties ultimately were able to achieve a negotiated settlement. *Aerial Incident of 3 July 1988* (*Iran v. U.S.*), 1989 I.C.J. 132 (Dec. 13), and 1996 I.C.J. 9 (Feb. 22).

ranging from the international recognition of copyrights[49] and patents[50] to the transport of goods by air.[51]

The United States has also agreed to submit to the jurisdiction of other binding arbitration mechanisms to protect U.S. trade and investment interests. Of most recent significance to commercial interests are Chapter 11 of the North American Free Trade Agreement ("NAFTA")[52] and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") of the World Trade Organization ("WTO").[53] Together, NAFTA and the WTO grant private interests and sovereign nations, respectively, compulsory resort to binding arbitral tribunals.

The benefits stemming from these treaties and their binding dispute-resolution mechanisms are not illusory. Since 1996, American investors have initiated arbitral proceedings under NAFTA against the government of Canada at least eight times, and against the government of Mexico at least twelve times, with at least five of those cases resulting in compensation for the American investors, while

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[49] Universal Copyright Convention, art. XV, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146.

[50] Patent Cooperation Treaty, art. 59, *opened for signature* June 19, 1970, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262.

[51] International Air Transport Agreement, art. IV, § 3, *opened for signature* Dec. 7 1944, 3 Bevans 922, 925, 84 U.N.T.S. 389, 394; *see also* Convention on International Civil Aviation, ch. XVIII, art. 84 *opened for signature* Dec. 7, 1944, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352.

[52] North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, 32 I.L.M. 605, 639 (1993).

[53] In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation "to have recourse to and abide by the rules and procedures" of the DSU. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994).

six of the cases remain pending.[54] Similarly, 74 of the 324 disputes that have been initiated before WTO tribunals were brought by the United States as a complainant.[55]

There is no guarantee that the diplomatic fallout from the several States' ongoing flouting of the ICJ and the VCCR can be limited to those settings. We cannot expect other nations to abide by the judgments of international dispute-resolution and arbitral bodies, if our state courts regularly fail to accord comity and respect to the ICJ's treaty interpretation in *LaGrand* and *Avena*. Condoning the failure of the several States to comply with the treaty interpretation in *Avena* would damage U.S. interests under numerous treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States's ability to negotiate new diplomatic covenants.

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[54] For a list of NAFTA Chapter 11 cases, see NAFTA Investor-State Arbitrations, *at* http://www.state.gov/s/l/c3439.htm (last visited Dec. 18, 2005), and NAFTA-Chapter 11-Investment, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp (last visited Dec. 18, 2005). *See also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 760 (2004) (recognizing U.S. adherence to the decision of a NAFTA arbitration panel); *Canada v. S.D. Myers, Inc.*, [2004] F.C. 38, ¶¶ 37, 39 (affording a "high level of deference" to a NAFTA Tribunal in affirming a $7 million award to an American investor against the Canadian government, "so as to be sensitive to the need of a system for predictability in the resolution of disputes").

[55] *See, e.g.*, Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997) (complaint by the United States); Panel Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/R/USA (Aug. 18, 1997) (complaint by the United States). For a list of past and pending DSU cases, see WTO, Chronological List of Dispute Cases, *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Dec. 18, 2005).

CONCLUSION

In cases such as this, this Court should look beyond narrow U.S. interests to the "mutual interests of all nations in a smoothly functioning international legal regime" and, whenever possible, should "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."[56] For the foregoing reasons, *Amici* urge the Court to find that the nation's diplomatic, commercial, and economic interests will best be served by directing the state courts whose decisions are under review to adhere faithfully to the ICJ's interpretation of Article 36, as set forth in the *LaGrand* and *Avena* decisions.

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[56] *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part and dissenting in part).

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